

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Defense Motion for Appropriate Relief
Order for Defense to be permitted access to
Prison Camp(s), JTF-GTMO

31 July 2008

1. **Timeliness:** This Motion is timely filed.
2. **Relief Sought:** Detailed defense counsel for Mr. Mohammed Kamin respectfully requests the Commission enter an Order that detailed defense counsel and his interpreter be permitted to enter the Prison Camp, JTF-GTMO, wherein Mr. Kamin resides, so that he may communicate directly with Mr. Kamin about his right to be present at Commission proceedings.
3. **Burden and Standard of Proof:** As the moving party, the defense bears the burden of persuasion. The defense also bears the burden of proof on any question of fact; this burden is met by a showing of a preponderance of evidence. *See* R.M.C. 905(c).
4. **Facts:**
 - a. Charges against Mr. Kamin were referred for trial by Military Commission on 4 April 2008. [AE 001] On 7 April 2008, the Chief Defense Counsel detailed LT Richard Federico, JAGC, USN, to represent Mr. Kamin. [AE 007]
 - b. Mr. Kamin was arraigned on the Charge on 21 May 2008. As he repeatedly stated during the arraignment, Mr. Kamin refused to be represented by his detailed defense counsel. Mr. Kamin also declined to represent himself, *pro se*, and further stated his intent not to attend future proceedings.
 - c. The Commission ordered LT Federico to represent Mr. Kamin because [REDACTED]
[REDACTED] *See Transcript of*
Hearing ICO United States v. Kamin, May 21, 2008 (Draft), pg. 42.
 - d. Subsequent to the arraignment, detailed defense counsel has scheduled

appointments to meet with Mr. Kamin on five separate dates. On each occasion, detailed defense counsel was informed by personnel from the Staff Judge Advocate Office (SJA), JTF-GTMO, that Mr. Kamin did not wish to meet with detailed defense counsel. As such, detailed defense counsel has not seen or met with Mr. Kamin since the arraignment.

e. On each occasion that Mr. Kamin refused to meet with detailed defense counsel, detailed defense counsel would write a note for Mr. Kamin on GTMO L-Form 4 (SEP 06) titled, "JTF-GTMO Refusal Communication" that was translated into Pashto, Mr. Kamin's native language. [Attachment A]. This note is "non-privileged communication." On each occasion, personnel from the SJA Office would take the forms into the Prison Camp where Mr. Kamin resides. On several occasions, detailed defense counsel requested that he and/or his interpreter be permitted to accompany the SJA personnel into the Camp. This request was denied each time as being "against the rules."

f. On 30 July 2008, the parties held a "802 Conference" wherein they discussed the possibility that Mr. Kamin may elect to voluntarily absence himself from the hearing. Detailed defense counsel voiced general concerns as to what he could stipulate to as far as necessary prerequisite findings of fact, and that he had some concerns about potential problems of translation of information to Mr. Kamin.

g. After the 802 Conference, detailed defense counsel submitted a written request to trial counsel for submission to the SJA Office. The request sought permission for detailed defense counsel and his interpreter be permitted to enter the Prison Camp to speak with Mr. Kamin. The purpose of the access sought is to ensure Mr. Kamin has been fully informed of the following: [Attachment B]

1. That a hearing has been scheduled;
2. The issues that will be heard at this hearing;
3. That he has a right to be present;
4. That he may waive his presence, if he chooses;
5. That the MJ must grant permission for him not to be present;
6. That the MJ will only provide this permission for good cause; and
7. To determine whether any decision by Mr. Kamin has in any way been influenced by those that monitor his confinement.

h. Later on 30 July 2008, the Commission provided to the parties a "Statement of Understanding, Right to be Present at all Commission Proceedings" and instructed the government to ensure Mr. Kamin signs the statement or is given the opportunity to sign it. The government was also instructed to ensure that the proper language translation of the document is accomplished, with approval of defense counsel.

i. On 31 July 2008, the defense was informed that its request to enter the prison camp where Mr. Kamin resides was denied by JTF-GTMO.

5. Law and Argument:

a. An attorney-client relationship is not formed by the mere detailing of counsel by a competent authority. There must be an acceptance of the assignment by the accused. *See U.S. v. Brady*, 8 U.S.C.M.A. 456 (1957); *U.S. v. Miller*, 45 M.J. 149 (C.A.A.F. 1996). Mr. Kamin has not consented, either expressly or implicitly, to being represented by LT Federico, his detailed defense counsel. At present, there is no attorney-client relationship formed. As such, detailed defense counsel files this Motion solely under the authority provided by the Commission on 21 May 2008 that detailed defense counsel shall represent the accused in this case. Lacking authority from Mr. Kamin to do anything in his defense, detailed defense counsel submits this issue to Commission to fulfill the basic and general duties of defense counsel to provide initial advice to ensure that Mr. Kamin has the full understanding about one of his fundamental rights, one that may also have a significant impact on detailed defense counsels ethical duties to provide representation to Mr. Kamin. *See R.M.C. 502(d)(6), Discussion.*

b. Communications between client and counsel are integral to the constitutionally required right to representation. *See generally, United States v. Padilla*, 203 F.3d 156, 160 (2d Cir. 2000). Ethical rules likewise require that a detailed defense counsel keep a client informed of the progress of the case. *See Dept. of the Navy, JAGINST 5803.1C, Rule 1.4(a)* (“A covered attorney shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”); *see also INDIANA RULES OF COURT*¹, Rules of Professional Conduct (1999), Rule 1.4(a)(3) (“A lawyer shall keep the client reasonably informed about the status of the matter.”).

¹ Detailed defense counsel is licensed to practice law in the State of Indiana.

c. A Sixth Amendment violation arises when a court precludes defense counsel from discussing matters with the client. *See Geders v. United States*, 425 U.S. 80, 91, 96 S.Ct. 1330 (1976) (finding Sixth Amendment violation where trial judge precluded attorney-client communications during an overnight recess in the trial, while client was on the stand). The defense need not show prejudice to establish this violation of the Sixth Amendment. *See Id.* In the present case, it is JTF-GTMO that precludes defense counsel from discussing matters of fundamental importance with Mr. Kamin. The defense can no longer allow JTF-GTMO to be the intermediary between what should be privileged communications. *See M.C.R.E. 502.* It is the duty of the Commission to ensure this obstruction is removed.

d. “No person may attempt to coerce or, by any unauthorized means, influence...the exercise of professional judgment by ...defense counsel.” 10 U.S.C. § 949b; *see also* R.M.C. 104(a)(2). The rules of the JTF-GTMO, if any such exist, that limit access to charged detainees result in an unlawful influence over the professional judgment of defense counsel in that they obstruct detailed defense counsel from developing an attorney-client relationship. The JTF-GTMO rules, if any such exist, effectively operate to disavow detailed defense counsel the opportunity to fulfill the basic duties of representation. *See R.C.M. 502(d)(6), Discussion.*

e. The right of the accused to be present at trial is so fundamental that the accused should only be permitted to waive the right to be present for good cause, and only after the military judge explains to the accused the right, and the consequences of foregoing it. *See R.M.C. 804, Discussion.* During the arraignment, Mr. Kamin was advised of his right to be present and that he may also voluntarily absent himself from future proceedings. “For an absence from the commission proceeding to be voluntary,

the accused must have known of the scheduled proceedings and intentionally missed them.” *Id.* “Voluntariness may not be presumed, but it may be inferred...[f]or example, it may be inferred, in the absence of evidence to the contrary, that an accused who was present when the trial recessed and who knew when the proceedings were scheduled to resume, but who nonetheless is not present when the court reconvenes at the designated time, is absent voluntarily.” *Id.* The example cited wherein voluntariness may be inferred is not applicable to the present hearing because Mr. Kamin was not present when the trial recessed last. Further, there is not evidence that Mr. Kamin even knows why the proceedings are scheduled to resume.

f. The “Statement of Understanding” issued by the Commission may, generically, be able to explain to Mr. Kamin his fundamental right to be present, however, it cannot be an adequate substitute for having an attorney be permitted to explain, in detail, this right and the consequences of foregoing it. Further, neither the “Statement of Understanding” nor even an attorney from the SJA Office can fully explain to Mr. Kamin the issues to be discussed at the hearing. Finally, it is nonsensical to allow personnel that work for the confining authority (i.e. any personnel from JTF-GTMO) to inquire whether Mr. Kamin’s decision has, in any way, been influenced by an actual or perceived threat of consequences if he chooses to exercise his fundamental rights. Only detailed defense counsel is capable of making the necessary inquiries.

g. Detailed defense counsel has never been provided any specific basis for denial of his repeated request that either he and/or his interpreter be permitted into the Camp to speak with Mr. Kamin in his cell (or through the beanhole). Allegedly, this is in violation of Camp rules, however, citation to any specific rules, if any such rules do exist, has never occurred. Further, it is common practice for non-security personnel to speak

with detainees in their cell and/or through the beanhole to the cell. For example, medical personnel (psychiatrist, psych techs, etc.) routinely enter the cells to meet with detainees.

h. Should the Military Judge require further evidence regarding the basis of JTF-GTMO's denial the defense request, the defense suggests an alternative relief that may be appropriate would be that the Commission order that the SJA Office, JTF-GTMO, provide to the Military Judge, for an *in camera* review, a written memorandum that details, with citation to supporting authority, the basis for its obstruction. See **Attachment C**. An *in camera* review is specifically authorized under the rules for situations wherein the military judge must make a determination as to whether information must be disclosed to the defense when there exist a competing interest that such information must be protected from disclosure for reasons of national security, protection of privilege, etc. See 10 U.S.C. § 949d(f)(2)(C); M.C.R.E. 502(b)(3); M.C.R.E. 506(i); M.C.R.E. 513(e)(3).

6. **Request for Oral Argument:** The defense requests oral argument as it is entitled pursuant to R.M.C. 905(h), and for this matter to be discussed at the hearing scheduled for 31 July (1 August 2008, depending upon availability of courtroom and the parties).

7. **Witness Request:** The defense request the following witness be produced to testify:

a. [REDACTED], U.S. Army, SJA Office, JTF-GTMO, [REDACTED], [REDACTED]. [REDACTED] can testify regarding the numerous client visitation appointments detailed defense counsel has had with Mr. Kamin and Mr. Kamin's refusals to meet with detailed defense counsel. Additionally, [REDACTED] can testify that detailed defense counsel has requested on numerous occasions that he and/or

his interpreter be permitted to enter the Camp to speak directly to Mr. Kamin. [REDACTED]

[REDACTED] can testify as to the denial of this request, and provide the basis of denial.

8. **Conference with Opposing Counsel:** Pursuant to Military Commissions Rules of Court, Rule 3.3, the defense conferred with the Prosecution regarding its requested relief. The prosecution opposes the requested relief.

9. **Attachments:**

- A. GTMO L-FORM 4 (SEP 06) (2 pgs)
- B. Email of LT Federico, dated 30 July 2008 (1 pg.)
- C. Proposed Order to JTF-GTMO (1 pg.)

Respectfully submitted,

By: 

LT RICHARD E.N. FEDERICO, JAGC, USN
Detailed Defense Counsel for
Mohammed Kamin
Office of the Chief Defense Counsel
Office of Military Commissions
[REDACTED]

ATTACHMENT A

JTF-GTMO Refusal Communication

Date: _____ Time: _____

From: _____

(please print)

To: _____

(please print)

JTF Witness: _____

(Print name after delivery to detainee)

English version

Do you wish to meet with your attorney?

☐ **Yes**

☐ **No**

Detainee Signature: _____

JTF-GTMO Refusal Communication

Date: _____

Time: _____

From: _____

(please print)

To: _____

(please print)

JTF Witness: _____

(Print name after delivery to detainee)

Translation

(Yes)

(No)

☐☐

ATTACHMENT B

Federico, Richard E LT USSOUTHCOM JTFGTMO

From: Federico, Richard E LT USSOUTHCOM JTFGTMO
Sent: Wednesday, July 30, 2008 4:53 PM
To: Trest, Rachel LT USSOUTHCOM JTFGTMO ELC
Cc: Federico, Richard, LT, DoD OGC; [REDACTED]
Ashmawy, Omar Maj USSOUTHCOM JTFGTMO ELC
Subject: Defense Request to meet with client (1045)
Importance: High

Rachel:

Please feel free to fwd this directly to JTF-GTMO.

The defense (defense counsel and interpreter) respectfully request to be permitted to enter the camp to speak with Mr. Kamin. The opportunity to do so is critical so the defense can ensure that Mr. Kamin has been fully informed of the following:

1. That a hearing has been scheduled
2. The issues that will be heard at this hearing
3. That he has a right to be present
4. That he may waive his presence, if he chooses
5. That the MJ must grant permission for him not to be present
6. That the MJ will only provide this permission for good cause

In addition, it is critical that defense be able to ask Mr. Kamin whether his decision has in any way been influenced by those that monitor his confinement.

There is no adequate substitute. No one at JTF-GTMO can fully brief Mr. Kamin on these issues, particularly as to the second and final points.

However, should JTF-GTMO not allow defense counsel to enter the camp, the defense requests that its interpreter be allowed to enter the camp and read the court's notice to Mr. Kamin.

If these requests are denied, the defense request that a written response be provided that details the basis of denial. Please let me know if there is more information I can provide. As time is very much of the essence on these issues, your assistance in facilitating a timely response is appreciated.

R/

ATTACHMENT C

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

ORDER

v.

MOHAMMED KAMIN

31 July 2008

1. This Order is issued pursuant to the authority under the Military Commissions Act (MCA) of 2006 (10 U.S.C. §§ 948a, *et seq.*) and the Manual for Military Commissions (MMC).

2. Accordingly, IT IS HEREBY ORDERED:

That the Commander, Joint Task Force – Guantanamo Bay, Cuba (JTF-GTMO) shall provide to the Military Judge, for an *in camera* review, no later than 1630 EST, 1 August 2008, a written memorandum that details the basis for denying the defense request to allow detailed defense counsel, LT Richard Federico, JAGC, USN, and the defense interpreter to enter the Camp wherein Mr. Kamin resides to speak with the Mr. Kamin in his cell. If any applicable instructions, standard operating procedures, or related documents are cited as references or authority for the basis of denial, copies of the relevant portions of such references shall also be attached with the memorandum.

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge